

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

FEB 26 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0319-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MICHAEL EUGENE BARNES, JR.,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041412

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 Following a jury trial, petitioner Michael Barnes was convicted of second-degree murder, attempted second-degree murder, assault, and criminal trespass. The trial

court sentenced him to presumptive, consecutive prison terms of sixteen and 10.5 years for the first two counts and to time served for the remaining counts. We affirmed the convictions and sentences on appeal. *State v. Barnes*, No. 2 CA-CR 2006-0035 (memorandum decision filed Aug. 9, 2007). Barnes subsequently filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging appellate counsel had been ineffective. The trial court denied relief without conducting an evidentiary hearing, and this petition for review followed. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶2 Barnes was found guilty of fatally shooting Tracy F.'s boyfriend, Eugene, in the home where Tracy and Eugene lived with Eugene's daughter and the children of Tracy and Barnes. Barnes also shot at Tracy but did not hit her. On appeal, we affirmed the trial court's denial of Barnes's motion for a judgment of acquittal and also noted: "At trial Barnes denied he had shot anyone. He maintained Carlos R. had accompanied him to Tracy's home, had hit Eugene, and that Carlos and two other companions had been in the living room with Eugene when Eugene was shot." *Barnes*, No. 2 CA-CR 2006-0035, ¶ 2. Carlos, who testified on behalf of the state, had three prior felony convictions; he was incarcerated for the most recent conviction, for aggravated assault, when he testified in this matter.

¶3 Before Carlos testified, the state had sought to preclude evidence of the nature of his prior convictions. The state asserted that, in light of Barnes's defense that Carlos was

the guilty party, informing the jury that Carlos had been convicted of aggravated assault with a gun would be more prejudicial than probative under Rule 403, Ariz. R. Evid. Defense counsel countered: “Clearly it’s probative. The balancing I don’t believe comes in.” Defense counsel added that the jury should be informed that Carlos had been convicted of aggravated assault with a gun, or at the very least, that he had been convicted of aggravated assault and two burglaries. The trial court noted that the decision whether to reveal the nature of the prior conviction to the jury was within its discretion and found: “[I]t’s been the practice for a long time that sanitization is the Court’s policy, and absent ex[.]igent circumstances . . . it gets sanitized.” The court then ruled that the jury would only be permitted to “know there are the three prior felony convictions, not what they’re for.” *See State v. Montañó*, 204 Ariz. 413, ¶ 66, 65 P.3d 61, 74 (2003) (Arizona case law consistently approved sanitizing to limit prejudicial effect of prior convictions used for impeachment); *State v. Williams*, 144 Ariz. 479, 482, 698 P.2d 724, 727 (1985) (same).

¶4 Carlos then testified he was currently incarcerated for his third felony conviction. He also testified that he initially had hidden from police officers after the shootings and was relieved to ultimately learn he was not a suspect in the case. Notably, he also testified that the state had given him immunity, which he understood to mean he would not “get in trouble” for anything he said in this matter.

¶5 Barnes argues, as he did below, that appellate counsel was ineffective for failing to challenge the trial court’s decision not to inform the jury of the nature of Carlos’s

prior convictions. He contends that, by denying him the right to fully cross-examine Carlos, the court prohibited him from presenting evidence that “went to the heart of [his] claim that he did not commit the crime.” Barnes also asserts that, because Carlos’s testimony was “self-serving, uncorroborated and riddled with inconsistencies,” and because the other witnesses’ testimony left open “the possibility that Carlos . . . was the shooter, and not [Barnes],” it was essential that he be permitted to discredit Carlos’s testimony by disclosing the fact that Carlos had been convicted of aggravated assault. He contends that, if appellate counsel had raised this issue, “there is a reasonable probability that the appellate court would have recognized” the trial court’s error and reversed his conviction.

¶6 Relying on Rule 609(a), Ariz. R. Evid., Barnes argues appellate counsel should have challenged the trial court’s failure to make an explicit finding on the record that it had balanced the probative value of the evidence against its possible prejudicial effect. Rule 609(a) permits using a prior felony conviction to impeach the credibility of a witness “if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.” Although trial counsel did not object to the court’s failure to make a finding pursuant to Rule 609(a), he did make clear that he objected to the court’s sanitizing Carlos’s prior conviction.

¶7 In its ruling denying post-conviction relief, the trial court found that appellate counsel’s performance was not deficient nor was Barnes prejudiced by counsel’s performance. To state a colorable claim of ineffective assistance, a defendant must establish

both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Although the trial court addressed Barnes's claim under Rules 404 and 403, Ariz. R. Evid., rather than Rule 609(a), its analysis nonetheless shows that it properly balanced the prejudicial effect against the probative value of informing the jury of the specific nature of Carlos's prior felony conviction. In addition, although Barnes correctly points out the absence of formal findings showing that the court had properly exercised its discretion in a manner consistent with Rule 609(a), this omission does not constitute reversible error. *Cf. State v. Williams*, 144 Ariz. 433, 439, 698 P.2d 678, 684 (1985) (specific findings not necessary when basis for court's ruling appears in record).

¶8 In its ruling denying post-conviction relief, the trial court concluded the jury would have reached the same verdicts even if it had learned of Carlos's prior conviction for aggravated assault and, therefore, appellate counsel's failure to raise this issue did not prejudice Barnes:

In this case, there is no reasonable probability that evidence of the nature of [Carlos's] convictions would have changed the outcome of the jury verdict. The jury was already aware that [Carlos] had been convicted of several felonies and that his DNA had been found under the fingernails of one of the victims. Thus, [Barnes's] defense theory was adequately communicated without the need for specific, prejudicial details of [Carlos's] criminal background that had limited probative value and potentially great prejudicial effect. Additionally, the jury had ample evidence upon which to convict [Barnes] even

without [Carlos's] testimony. Specifically, the testimony of [Tracy], [Barnes's daughter], the two witnesses that accompanied [Barnes] to the scene and the 911 call all implicated [Barnes]. Because of this evidence, there is no reasonable probability that the jury would have found differently if [Carlos's] felony convictions had not been sanitized.

¶9 We additionally note the trial court's refusal to admit evidence of the nature of the prior conviction did not damage Barnes's "ability to argue that the [witness] was a convicted felon who was less worthy of belief for that reason." *State v. Cox*, 201 Ariz. 464, ¶ 6, 37 P.3d 437, 440 (App. 2002); *see State v. Beasley*, 205 Ariz. 334, ¶ 19, 70 P.3d 463, 467 (App. 2003) (impeachment with prior felony conviction allowed because "any felony conviction is thought to bear upon the credibility of the witness").

¶10 Because we conclude the trial court did not abuse its discretion in denying post-conviction relief, we grant the petition for review but deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge